IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Misc. Civil Application (Arbitration) No.727 of 2006

M/s. Rana Construction Co.,
registered partnership firm
of Civil Contractors,
having its office at
21, Awasthi Nagar,
Nagpur. ...Applicant

Versus

1. M/s. Vidarbha Aawas Udyog
   Private Limited,
   a Company incorporated
   under the Companies' Act, 1956,
   having its Registered office
   at S-17, Bharat Nagar,
   Amravati Road, Nagpur,
   through its Director,
   Bhalchandra S/o Laxmanrao Dhote,
   aged about 47 years,
   occupation business,
   R/o S-17, Bharat Nagar,
   Amravati Road, Nagpur.

2. M/s. Nagpur Allied Works

Corporation,
a business concern having
its office at 315, Laxmi Nagar (East),
Nagpur – 440 010,
through its authorised signatory
and constituted attorney
Smt. Shaila Gangadhar Chikalkar,
aged about 44 years – Nee -
Mrs. Shaila W/o Bhalchandra
Laxmanrao Dhote,
R/o S-17,
Bharat Nagar,
Amravati Road,
Nagpur.

3. Vidya Shikshan Prasarak
Mandal,
through its Sec. Shri
Prasantkumar S/o
Chittranjan Banerjee,
aged about 59 years,
No.5, YMCA Complex,
Sitabuldi, Nagpur. ...Non-Applicants

Shri V.D. Kukday, Counsel for Applicant.
Shri R.R. Chaudhari, Counsel for Non-Applicant No.1.
Shri Anilkumar Thakkar, Counsel for Non-Applicant No.2.
Shri S.C. Mehadia, Counsel for Non-Applicant No.3.

Coram : R.C. Chavan, J.

Date of Reserving the Order : 11-12-2006

Date of Pronouncing the Order : 10-1-2007

ORDER :

1. This is an application under Section 11 of the Arbitration and Conciliation Act for appointment of a sole arbitrator by a contractor, who had been awarded contract of construction of a hostel for non-applicant No.3, on non-applicant No.3's property.

2. Non-applicant No.3 entered into BOT (Built-Operate-Transfer) agreement with non-applicant No.1 for construction of a hostel with allied facilities, such as mess, gymnasium, etc. Clause 8 of this agreement provides for arbitration. Non-applicant No.1, in turn, entered into a tripartite work contract with non-applicant No.2 and the applicant, describing non-applicant No.2 as “agency” and the applicant as “contractor”. Clause 60 of this contract embodies arbitration clause. Work was to be executed by the applicant as per drawings and designs approved by non-applicant No.3's architects and engineers. Though the applicant executed the work, non-applicants No.1 and 2 did not make payment. Last bill submitted by the applicant was for

Rs.1,21,90,075/-. The applicant issued a notice. There was no demur but no payment either. The applicant, therefore, issued a notice on 24-4-2006 to non-applicants No.1 and 2 proposing appointment of Dr. Basole, an expert, as sole arbitrator. The applicant also sent a letter to non-applicant No.3 informing them of notice dated 24-4-2006. Non-applicant No.3 had terminated contract with non-applicant No.1, as the work could not be executed within the period of contract. Non-applicant No.1 had also reportedly issued a notice to non-applicant No.3. The applicant, therefore, prayed that Shri Basole be appointed as sole arbitrator to arbitrate into the disputes among the parties.

3. Non-applicant No.1 filed a reply stating, among other things, that before going for arbitration, in terms of Clause 60 of the contract, all the disputes and differences were to be referred for decision by the developer, i.e. non-applicant No.1. Since there was no such decision, stage of arbitration had not arisen. Non-applicant No.1 had accepted and certified the bills received from the applicant. Non-applicant No.1 had written to non-applicant No.3 that if non-applicant No.3 satisfied applicant's bills, non-applicant No.1 had no objection and that such payments could be deducted from non-applicant No.1's claim against non-applicant No.3. Thus, there was

no arbitrable dispute and hence, the application was not tenable.

4. Non-applicant No.2 has taken a similar stand.

5. In the submissions filed on behalf of non-applicant No.3, non-applicant No.3 alleges that the disputes, if any, are between the applicant and non-applicants No.1 and 2. Non-applicant No.3 is not a party to the agreement between non-applicants No.1 and 2 and the applicant. Therefore, there is no arbitrable dispute between the applicant and non-applicant No.3.

6. I have heard Shri V.D. Kukday, the learned counsel for the applicant; Shri R.R. Chaudhari, the learned counsel for non-applicant No.1, Shri Anilkumar Thakkar, the learned counsel for non-applicant No.2, and Shri S.C. Mehadia, the learned counsel for non-applicant No.3.

7. The question involved in this proceeding is whether there is an arbitrable dispute between the applicant on the one hand and non-applicants No.1 to 3 on the other. And, if there is such a dispute, what is that dispute ? The learned counsel for non-applicant No.3 submitted that since there was no agreement between non-applicant No. 3 and the applicant, there could be no dispute capable of being referred to arbitration between the applicant and non-applicant No.3. It was

necessary for the applicant to first show as to how non-applicant No.3 could be involved in any arbitration proceedings.

8. The learned counsel for the applicant submitted that absence of a contract, or even an arbitration agreement, directly between the applicant and non-applicant No.3 was immaterial. The land in question belonged to non-applicant No.3, work thereon was to be carried on by the applicant as per the drawings supplied by non-applicant No.3's architects and engineers, and under their supervision. The funds for construction work were also to be provided to non-applicants No.1 and 2 by non-applicant No.3. He submitted that hence absence of an agreement between the applicant and non-applicant No.3 was not relevant. Relying on a judgment of the Supreme Court in Union of India v. A.L. Rallia Ram, reported in AIR 1963 SC 1685, the learned counsel submitted that a formal contract was not required to bind the parties. In that case, the question was one of Government of India entering into contract under the provisions of Section 175 of Government of India Act, 1935. In the context of facts of that case, the Supreme Court held that a formal contract was not required if the Government of India had floated a tender, received an offer, and had issued an acceptance note enclosing a form setting out general conditions of contract. The Court

held that this conduct would show that a contract had been entered into though no formal contract was signed. In the form setting out general conditions of contract, which was sent along with the acceptance note, condition No.13 embodied an arbitration clause. It may be seen that in the present case, tender had not been floated by non-applicant No.3 nor had the applicant responded to such tender. Therefore, there was no occasion for non-applicant No.3 to communicate to the applicant about the acceptance of the tender. Hence, the analogy of decision reported in Union of India v. A.L. Rallia Ram is not applicable.

9. In M/s. Progressive Constructions Ltd. v. Bharat Hydro Power Corporation Ltd., reported in AIR 1996 Delhi 92, on which the learned counsel for the applicant placed reliance, also, the Court held that absence of formal contract did not matter, since tenders were floated, offers were received and acceptance was communicated. In this context, it was held that the arbitration clause in the tender document would bind the parties.

10. The learned counsel for the applicant next relied on a decision of this Court in Prem Laxmi & Co. v. Trafalgar House Construction India Ltd., Bombay, reported in 1999(2) Arb.LR. 103 (Bombay) . In that case, arbitration clause was sought to be invoked by a sub-contractor

against the contractor, though the agreement between the contractor and the sub-contractor did not contain any arbitration clause. It may be seen that in that case, the sub-contractor had not sought arbitration of any dispute between himself and the principal – Tata Electric Company. The agreement between the sub-contractor and the contractor provided, among other things, that all the conditions of contract as per the principal – Tata Electric Company's Tender document, except those excepted, would apply on back to back basis. This tender document contained arbitration clauses. It was held that those arbitration clauses would have to be read into the agreement between the sub-contractor and the contractor, though this agreement did not contain any explicit arbitration clause.

11. This decision also would not help the learned counsel for the applicant, because first, the sub-contractor had not sought to have any dispute with the principal arbitrated. The arbitration clause was read into the agreement between the contractor and the sub-contractor because of a specific term, which made a reference to the tender document. Therefore, in the present case, in the absence of any agreement or correspondence between the applicant and non-applicant No.3, it would not be open for the applicant to involve non-applicant No.3

in the proceedings.

12. The learned counsel for the applicant placed reliance on a judgment of the Supreme Court in Smita Conductors Ltd. v. Euro Alloys Ltd., reported in 2001(3) Arb.LR 275 (SC). In that case, the respondent had proposed to the appellant a contract containing an arbitration clause. By a letter, whereby the contract was forwarded, the appellant was asked to sign the contract and return copy for issuing the "goods ordered". The contract was, however, not signed or returned. Second contract too, which was similarly forwarded, was not signed or returned. But the appellant opened irrevocable letters of credit and shipments were made. When the contract could not be performed further, the respondent invoked arbitration clause. The appellant filed a suit for declaration that there was no valid agreement for arbitration. The suit was treated as a petition under Section 33 of the Arbitration and Conciliation Act and was dismissed. A foreign award was passed on the basis of arbitration proceedings initiated by the respondent. The respondent filed a petition for enforcement of the award. The High Court allowed the petition, but also granted a certificate under Article 134 of the Constitution and this is how the appellant preferred an appeal before the Supreme Court. The question before the Court was whether there

was an agreement in writing to refer the dispute to arbitration, as contemplated in Article II of New York Convention, which has been included as Schedule I to the Arbitration and Conciliation Act. The Article reads as under :

> *" ARTICLE II*
>
> *1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.*
>
> *2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
>
> *3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*
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> *(Emphasis supplied)*

In this context, the Court held as under :

" 6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, if consists of four aspects. It includes an arbitral Clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the bank to which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23.4.1990 in which there is a reference to two contracts bearing Nos.S-142 and S-336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively

and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard.

After considering rival contentions, the Court concluded in para 10 that the appellant could not challenge existence of arbitration of agreement and, therefore, dismissed the appeal.

13. The learned counsel for the applicant submitted that just as opening of letters of credit by the appellant Smita Conductors was held to signify acceptance of agreement, though no written contract was signed, the letters and documents written by non-applicant No.3 and annexed to the petition as Annexures 16, 17, 18 and 19 facilitating raising of loan by non-applicant No.1 would signify an agreement

between the applicant and non-applicant No.3. This argument too has to be rejected, because none of these letters make any reference to any contract between the applicant and non-applicants No.1 and 2. There is nothing to show that non-applicant No.3 had issued annexures 16, 17, 18 and 19 in order to provide for payment for the work done by the applicant. In view of this, there is nothing to show that there was a three-tier contract, as is suggested by the learned counsel for the applicant, creating any binding relationship between the applicant and non-applicant No.3.

14. The condition about supervision by non-applicant No.3's architects and engineers is imposed in contract between the applicant and non-applicants No.1 and 2 and cannot be said to be a term settled between the applicant and non-applicant No.3. In any case, it is not shown that there is any dispute about non-compliance of such a term.

15. Reference to judgment of the Supreme Court in Shin-Etsu Chemical Co. Ltd. v. M/s. Aksh Optifibre Ltd. & Anr., reported in 2005(3) R.A.J. 1 (SC), is not necessary, because the question in the present case is not of validity of an arbitration agreement, but one of existence of such an agreement. Since it is not shown that there was any agreement, conduct, or correspondence, which could be interpreted

as an agreement between the applicant and non-applicant No.3, it has to be held that non-applicant No.3 has been unnecessarily involved in the present proceedings.

16. It has next to be seen as to whether there is an arbitrable dispute between the applicant on the one hand and non-applicants No.1 and 2 on the other hand, who have entered into a tripartite contract. The learned counsel for the applicant relied on a decision in Manohar Lal Gupta & Co. Pvt. Ltd. v. State of Himachal Pradesh and others, reported in 1992(1) Arb LR 70, and West Bengal Comprehensive Area Development Corporation & Anr. v. Sansanka Sekhar Banerjee, reported in 1985 Arb LR 230, to support his contention that there is an arbitrable dispute. The learned counsel submitted that a dispute arises upon assertion of set of facts by one party and repudiation thereof by the other. He submitted that when certain facts are asserted by a notice sent by the applicant, even if such facts are not expressly repudiated and even if a party maintains a sphinx-like silence, it has to be held that there is a dispute. In West Bengal Comprehensive Area Development Corporation & Anr. v. Sansanka Sekhar Banerjee, the defendant, who had received a notice from the plaintiff, had replied that there was in fact no dispute between the parties and that, therefore,

there was no question of reference to arbitration. The defendant had added that if the plaintiff did refer the matter to arbitration, the defendant would not lack in co-operation. After this, the plaintiff filed the suit in which the defendant raised the arbitration clause and in this context, the Court held that the matter should go to arbitration. The learned counsel for the applicant also referred to a decision of the Supreme Court in Parasramka Commercial Company v. Union of India, reported in 1969(2) SCC 694, which is about expecting an explicit notice after the award was signed and hence not useful for resolving the questions raised in this case.

17. In the context of what the learned counsel for the applicant has stated, it has to be found out as to whether there is an arbitrable dispute between the applicant and non-applicants No.1 and 2. The learned counsel for non-applicants No.1 and 2 submitted that there was absolutely no dispute between the applicant and non-applicants No.1 and 2, which was required to be arbitrated. Even according to the applicant, non-applicants No.1 and 2 had already informed non-applicant No.3 that non-applicant No.3 may pay the applicant for the work done and deduct the payment from the amounts due to non-applicants No.1 and 2. Non-applicant No.1 was unable to pay the applicant for

the work executed by the applicant, because he did not receive payment from non-applicant No.3. He submitted that there was absolutely no dispute about the quantum of work executed by the applicant or the amount, which was to be paid to the applicant towards such work. Therefore, according to him, as of now there was no dispute, which would require examination by an arbitrator. He submitted that the question was only of non-payment of amounts due for reasons, which were beyond the control of non-applicant No.1. The learned counsel submitted that the role of this Court in discharging functions under Section 11 of the Arbitration and Conciliation Act has been elaborated by the Supreme Court in M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. and Anr., reported in AIR 2006 SC 450. The learned counsel drew my attention to the observations of the Court in para 36 of the judgment, where the Court had observed that there have been instances where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no further claims against the other contracting party. In such cases, the Court has to come to the conclusion whether there is an arbitrable dispute. The learned counsel for non-applicants No.1 and 2 submitted that in the instant case, there was no dispute between the applicant and

non-applicant No.1 about the work executed by the applicant. He further submitted that Clause 60 of the agreement between the applicant and non-applicants No.1 and 2 enjoins the applicant to first refer the dispute, if any, to the developer. Only upon a decision being given by the developer, could the applicant have a chance to state that there was any arbitrable dispute. Therefore, the learned counsel for non-applicants No. 1 and 2 submitted that the application is premature.

18. It may be seen from the pleadings as well as the arguments advanced that there is no contract or agreement of any sort between the applicant and non-applicant No.3. There is no dispute between the applicant and non-applicants No.1 and 2, who have a contract, about the work executed by the applicant or the payment, which is required to be made. Even if there had been such a dispute, the applicant has not referred the same under Clause 60 of the agreement for decision by the developer and, therefore, invocation of arbitration clause is premature. Lastly, disputes, if any, between non-applicants No.1 and 2 on the one hand and non-applicant No.3 on the other hand, cannot be referred to arbitration in the present proceedings, since none of the parties to the said agreement have sought any such reference. Therefore, the applicant, as a stranger to the said agreement, cannot seek to have the

disputes, if any, between non-applicants No.1 and 2 on the one hand and non-applicant No.3 on the other, referred to arbitration.

19. In view of this, the application is misconceived and is rejected.

JUDGE

PDL/-